Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1350

GABRIEL SZEKELY, M.D., *Petitioner*

v.

FORREST D. MATHEWS, SECRETARY OF HEALTH, EDUCATION & WELFARE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Gabriel Szekely, M.D., (Dr. Szekely) petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on August 8, 1975. At the time this case was originally filed, Caspar Weinberger was the Secretary of Health, Education and Welfare and hence was a named Defendant; he has since resigned and his successor is named as Respondent herein.

DECISIONS BELOW

The initial opinion of the Court of Appeals is found at 517 F.2d 345-350. The judgment of the Court of Appeals and the order on petition for rehearing are included in our appendix. The decision of the United States District Court for the Southern District of Florida was reversed by the Court of Appeals and is also included in our appendix.

JURISDICTION

Our petition for rehearing, was timely filed. It was denied by the Court of Appeals on February 2, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This action involves the Medicare Act, which Title XVIII of the Social Security Act. [42 U.S.C. 1395, etc.] The applicable part of the Medicare Act will be referred to in our brief as "Part B". Also involved is the Fifth Amendment to the United States Constitution.

COMPANION CASE

The Court of Appeals on August 8, 1975, also decided the case of *Mount Sinai Hospital of Greater Miami* v. *Weinberger*, which is reported at 517 F.2d 329. (*Mount Sinai*) Both *Mount Sinai* and the instant case were argued before the Court of Appeals on the same date. The District Court relied on the *Mount Sinai* decision, 376 F. Supp. 1099 when it entered judgment for your petitioner below. Petition for a writ of certiorari has previously been filed by Mount Sinai in this Court. While Mount Sinai, as a hospital, is involved with Part

A of the Medicare Act and your petitioner, as an assignee of benefits, is under Part B, essentially the same issues and law are involved in both cases. Instead of presenting this Court with a lengthy petition, we deem it in the convenience of all concerned to rely in great part upon the Mount Sinai petition herein.

QUESTION PRESENTED

Where Dr. Szekely's Medicare billings for the year 1970 were examined and approved by HEW pursuant to 42 U.S.C. 1395 y, which requires that no payments may be made under Part B which are not reasonable and necessary, and where HEW admits there is no evidence of fraud or that Dr. Szekely did not in fact perform and render the services for which he sought to be paid, does the application of common law right of recoupment by HEW constitute a violation of Dr. Szekely's Fifth Amendment rights?

STATEMENT OF THE CASE

A discussion of the Medicare Act is omitted as the same is adequately discussed in the Mount Sinai petition before this Court.

The petitioner is a doctor of medicine licensed to practice in the State of Florida. In 1967, and subsequent years, he rendered his healing art to patients, many of whom were Medicare beneficiaries under Part B and submitted claim forms, assignments, from such persons for payment.

HEW is prohibited by law from making any Medicare payments for medical services which are not reasonable and necessary for the diagnosis or treatment of illness or injury. 42 U.S.C. 1395 y. Nor is it allowed to make any such payments until it is first provided with

the necessary information to determine the amount, if any, is due. 42 U.S.C. 1395 1(e). In many such instances prior to payment, information was requested of Dr. Szekely. Some of the claims were fully paid and others were not. As to unpaid bills, Dr. Szekely never sought to invoke administrative or judicial remedies for full payment.

In April, 1972, HEW, through its intermediary, Blue Shield of Florida, Inc., advised Dr. Szekely that current payments due him were being withheld as Blue Shield claimed payments to Dr. Szekely in the year 1970 were 25% higher than the average of other similar physicians in Dade County, Florida.

After subsequent "peer review" proceedings, this litigation was instituted in the United States District Court for the Southern District of Florida.

Subsequently, summary judgment was entered for Dr. Szekely by the United States District Judge, relying upon the *Mount Sinai* decision, in the United States District Court for the Southern District of Florida, found at 376 F. Supp. 1099.

The United States District Judge held that prior to the 1972 amendments to the Social Security Act, the Secretary was without legal authority to recover payments for alleged overutilization. It was also held the 1972 amendments applied to payments made to physicians *after* October 30, 1972. (App. 1a-2a).

The Court of Appeals reversed, holding that the Medicare Act recognizes common law recoupment for payments improperly made. The Court also held that permitting recoupment does not constitute supervision of the practice of medicine prohibited by 42 U.S.C. 1395.

REASONS FOR GRANTING THE WRIT

The decision of the Court below is an erroneous interpretation of the Medicare Act, the result of which, we submit, violates the Fifth Amendment rights of Dr. Szekely. It puts Dr. Szekely in jeopardy of losing thousands of dollars in Medicare payments to which he was found to be entitled by law for his services rendered in good faith to Medicare patients.

As indicated in the excellent brief submitted by Mount Sinai in this Court, the Medicare program involves billions of dollars. The decision below, we submit, will have an enormous impact upon not only the operation of Medicare but, in addition, upon the practice of medicine in the United States. Any physician who is paid by Medicare for his services is now exposed to being required years later to refund his fees even though the applicable law required coverage to be determined *prior* to the payment.

Were fraud involved, the decision below would be entirely justified. However, HEW does not claim the billings of Dr. Szekely were fraudulent or that he did not in fact perform the services for which he was paid. Instead, it sought to reimburse itself under the justification that the number of visits of Dr. Szekely's patients exceeded the average of visits of patients to other physicians in the community.

The effect of the decision below places the United States on a different level and not subject to long established common law principles of fairness and justice. In *United States* v. *Johnston,* 124 U.S. 236, the Supreme Court held that:

> "... the approval by the Secretary of the Treasury of an agent's account of expenses ... would not be

> conclusive, if it appeared either that such approval was procured by fraud, or that such expenses were incurred in violation of some positive statute, or in contravention of public policy."

Dr. Szekely's Medicare billings in the year 1970 were approved in whole or in part by the Secretary of HEW, or his agents. No claim has ever been made by HEW such billings were fraudulent or violated existing statutes. Nor has HEW ever claimed that Dr. Szekely did not in fact perform the medical services for which he was paid.

The intent of Congress and the courts in this area has been that the physicians' opinion as to medical services must be given great weight. *Pippin* v. *Richardson,* 349 F.Supp. 1365 (M.D. Fla. 1972).

The Court of Appeals, in the *Mount Sinai* decision, relied upon *United States* v. *Barlow,* 132 U.S. 271 (1889). *Barlow*, however, involved fraudulently paid funds. Payments were fraudulently sought for mail services which were, not in fact performed. No fraud is involved in the instant case.

CONCLUSION

We submit the issue raised herein is of such national significance as to warrant this Court's review of the erroneous decision below. A writ of certiorari should, we urge, be issued to the Court of Appeals to review that decision.

Respectfully submitted,

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APPENDIX

Summary Judgment,

United States District Court

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 73-720-CIV-JE

GABRIEL SZEKELY, *Plaintiff*,

v.

CASPER WEINBERGER, *Defendant*.

Summary Judgment

THIS CAUSE is before the Court on defendant's motions to dismiss or, in the alternative, for summary judgment upon plaintiff's cross motion for summary judgment.

The plaintiff in this action seeks declaratory and injunctive relief. He asserts that the Secretary of the Department of Health, Education, and Welfare is without legal authority to reopen previously paid Medicare claims under Part B of the Medicare Act 42 U.S.C. §§ 1395j-1395w.

The First question to be resolved is whether or not this Court has jurisdiction. The plaintiff contends that jurisdiction is present under 28 U.S.C. § 1331(a) and 5 U.S.C. § 702. The defendant responds that this action is barred by the doctrines of soverign immunity and exhaustion of administrative remedies.

This Court finds that this action is not barred by 42 U.S.C. § 405(h) and may be maintained on the basis of federal question jurisdiction. *See, Kingsbrook Jewish Medical Center* v. *Richardson,* 486 F.2d 663, 666-67 (2nd Cir., 1973); *Aquavella* v. *Richardson,* 437 F.2d 397, 402 (2nd Cir., 1971); *Mount Sinai Hospital* v. *Weinberger,* No. 73-804 (S.D. Fla. F-b. 6, 1974). Moreover, the plaintiff has stated a claim for which relief can be granted on the basis of nonstatutory review under 5 U.S.C. § 703 of the Administrative Procedure Act.

Since the thrust of the plaintiff's challenge concerns the legal authority of the Secretary to reopen previously paid claims, the case at bar comes within the *Larson-Dugan* "officer suit" exception to the doctrine of soverign immunity. *Dugan* v. *Rank,* 372 U.S. 609 (1963); *Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U.S. 682 (1949). The Fifth Circuit Court of Appeals has stated that an "officer suit" is maintainable if the averments in the complaint are affirmative and explicit. *Carter* v. *Seamans,* 411 F.2d 767, 770-71 (5th Cir., 1969). The relief sought, cessation of the suspension order, does not offend *Larson's* admonition regarding relief requiring affirmative government action since the government routinely distributes medicare funds due to individual enrolee-beneficiaries absent an assignment being made.

The administrative procedures under 42 U.S.C. § 1395ff (a) and (b) concerning determinations of entitlement are inapplicable since payments were in fact made, and the defendant seeks to withhold current payments based on a determination of over-utilization. The Act does not require that administrative procedures be exhausted relevant to determinations of over-utilization.

The defendant contends that 42 U.S.C. § 1395gg(b) is statutory authority for the Secretary to reopen the plaintiffs' 1970 claims based on a present determination of over utilization. Even absent statutory authority, the defendant urges, the government has the common law right to extinguish a debt due by recoupment or by set-off.

On the issue of the Secretary's authority to reopen to recover payments for over utilization, this Court agrees with and follows the rationale of *Mount Siani Hospital* v. *Weinberger,* No. 73-804 (S.D. Fla., Feb. 6, 1974). *Mount Sinai,* held that prior to the 1972 amendments to the Social Security Act the Secretary was without authority to either impose sanctions or to recover payments for over utilization. See 42 U.S.C. § 1320c (Supp. II, 1972). Although

Mount Sinai is a provider of services case under Part A, its sound reasoning is applicable to the present case where the plaintiff submits claims as an assignee of an individual enrollee-beneficiaries under Part B rather than under Part A as a provider.

The 1972 amendments apply to payments made to practitioners and providers after October 30, 1972, and hence do not provide authority for recoupment of payments made to Dr. Szekely in 1970.

Therefore, Plaintiff Szekely is entitled to judgment on the merits and to a permanent injunction prohibiting unauthorized efforts by the Secretary to recoup medicare payments the plaintiff received prior to October 30, 1972, on the basis of a subsequent determination of over utilization. Therefore, it is,

ORDERED and ADJUDGED that:

1. The defendant's motion to dismiss or for summary judgment is denied.

2. The plaintiff's motion for summary judgment is GRANTED.

DONE and ORDERED at Miami, in the Southern District of Florida this *11th* day of July, 1974.

/s/ JOE EATON
United States District Judge

ORDER

On Petition For Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-3398

GABRIEL SZEKELY, M.D., *Plaintiff-Appellee,*

versus

FLORIDA MEDICAL ASSOCIATION, ET AL., *Defendants,*

CASPAR W. WEINBERGER, Secretary of Health, Education and Welfare, *Defendant-Appellant.*

Appeal from the United States District Court for the Southern District of Florida

On Petition for Rehearing

(February 2, 1976)

Before BROWN, Chief Judge, and GODBOLD and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.